

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-34566

ROY VAUGHN CARPENTER  
CATHY ANN CARPENTER

Debtors

WILLIAM T. HENDON, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 01-3017

G. E. CAPITAL MORTGAGE  
SERVICES, INC.

Defendant

**MEMORANDUM ON MOTION FOR STAY PENDING APPEAL**

APPEARANCES: HAGOOD, TARPY & COX, PLLC  
Edward J. Shultz, Esq.  
900 South Gay Street  
Suite 2100  
Knoxville, Tennessee 37902  
Attorneys for Plaintiff William T. Hendon, Trustee

BASS, BERRY & SIMS, PLC  
William H. Skelton, Esq.  
Timothy F. Zitzman, Esq.  
Post Office Box 1509  
Knoxville, Tennessee 37901  
Attorneys for Defendant G. E. Capital Mortgage Services, Inc.

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

On August 13, 2001, the court entered an Order authorizing the Plaintiff William T. Hendon, Trustee, to avoid the lien of the Defendant G. E. Capital Mortgage Services, Inc. (G. E.) on real property located at 408 Macedonia Church Road in Heiskell, Tennessee. The Order additionally declared the Trustee's interest in the real property and its proceeds (the Proceeds) superior to that of G. E., thereby rejecting G. E.'s assertion that it is entitled to a replacement lien under 11 U.S.C.A. § 550(e)(1) (West Supp. 2001). Now before the court is G. E.'s Motion for Stay Pending Appeal filed with G. E.'s Notice of Appeal on August 22, 2001.

## I

Motions for stay pending appeal are governed in bankruptcy by FED. R. BANKR. P. 8005, which directs in material part:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge.

In evaluating a motion under Rule 8005, the court must consider four factors:

- (1) the likelihood that the movant will prevail on the merits of the appeal;
- (2) the likelihood that the movant will be irreparably harmed absent a stay;
- (3) the chance that others will be harmed if the court grants the stay; and

(4) the public interest in granting the stay.

See *Stephenson v. Rickles Elecs. & Satellites (In re Best Reception Sys., Inc.)*, 219 B.R. 988, 992 (Bankr. E.D. Tenn. 1998) (citing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6<sup>th</sup> Cir. 1991)); accord *Stearns Bldg. v. WHBCF Real Estate (In re Stearns Bldg.)*, No. 98-1257, 1998 WL 661071, at \*3 (6<sup>th</sup> Cir. Sept. 3, 1998) (Applying *Griepentrog* to a Rule 8005 motion).

## II

G. E. states that it will be irreparably harmed unless the court's Order is stayed, because the Trustee is free to distribute the Proceeds to other parties in interest. If a distribution occurs, G. E. contends that the funds would be forever beyond its reach in the event of a reversal on appeal. Therefore, according to G. E., "adequate compensatory or other corrective relief" will be unavailable, necessitating a finding of "irreparable harm." See *Griepentrog*, 945 F.2d at 154.

In evaluating the risk of irreparable harm should the requested stay not be granted, the court should consider three issues:

- (1) the substantiality of the injury alleged;
- (2) the likelihood of its occurrence; and
- (3) the adequacy of the proof provided.

*Id.* at 154. While a Rule 8005 movant need not establish that all four *Griepentrog* factors weigh in its favor, the movant must provide at least some evidence that the alleged irreparable harm is

likely to occur. *See id.* at 153-54. Additionally, “the harm alleged must be both certain and immediate, rather than speculative or theoretical.” *Id.* at 154.

G. E. has not provided the court with any evidence that the Trustee is likely to distribute the Proceeds during the pendency of the appeal. At this point, G. E.’s alleged risk is merely “speculative or theoretical” and is thus insufficient to justify Rule 8005 relief. *See id.* at 154.

Because G. E. has failed to make any showing on the likelihood of irreparable harm, the Motion for Stay Pending Appeal must be denied regardless of the other three *Griepentrog* considerations. *See id.* (“[T]he harm alleged must be both certain and immediate . . . [and the] movant must provide some evidence that the harm . . . is likely to occur[.]”); *see also Best Reception*, 219 B.R. at 995. The court will, however, direct that the Trustee not distribute without an order from the court. An appropriate order will be entered.

FILED: September 10, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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**ORDER**

For the reasons stated in the Memorandum on Motion for Stay Pending Appeal filed this date, the court directs the following:

1. The Defendant's Motion for Stay Pending Appeal filed on August 22, 2001, is DENIED.
2. The Plaintiff will not distribute any portion of the proceeds realized from his sale of the property of the estate located at 408 Macedonia Church Road, Heiskell, Tennessee, without obtaining a prior order of the court.

SO ORDERED.

ENTER: September 10, 2001

BY THE COURT

*/s/*

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE